NO. 22733

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SYDNEY N. FLOERSHEIM, an individual trading and doing business as FLOERSHEIM SALES COMPANY and NATIONAL RESEARCH COMPANY,

Petitioner,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION TO REVIEW ORDER OF THE

FEDERAL TRADE COMMISSION

PETITIONER'S OPENING BRIEF

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TOPICAL INDEX

TABLE OF AUTHORITIES CITED

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ISSUES PRESENTED

1. Do the forms and materials used by petitioner violate Section 5 of the Federal Trade Commission Act?
2. Is the order issued by the Federal Trade Commission in this case unreasonable, arbitrary and capricious and thus a denial of substantive due process guaranteed by the Fifth Amendment of the Constitution of the United States?

3. Has the Federal Trade Commission exceeded its jurisdiction in making an order which goes well beyond that which is necessary to prevent any "deception in commerce" as prohibited in Section 5 of the Federal Trade Commission Act?

4. Is the issue of third party authority -- "conveying the inference that a debt has been referred to someone for collection when that is not true" -- raised in the complaint when there is no mention in the complaint that there have been any actions from which an inference could be drawn that debts have been referred to anyone for collection?

5. Is the Federal Trade Commission required to follow its own Rules of Practice and reopen proceedings rather than issue a new complaint as it did in the present case?

STATEMENT OF CASE

On October 11, 1954, the Federal Trade Commission issued a complaint against Mitchell S. Mohr and Sydney Floersheim (petitioner herein and respondent below) alleging that certain forms published by Mohr and sold by Floersheim were deceptive. On June 1, 1956, the Commission issued an order which was affirmed by this court.

In November, 1962, the Federal Trade Commission filed a petition in this court for the institution of prosecution for criminal contempt for violating the terms of the order.

This court found that the petitioner was not guilty of criminal contempt.

On November 7, 1966, the Federal Trade Commission issued the complaint in the present action. After a hearing before the Hearing Examiner, Joseph W. Kaufman, an Initial Decision was rendered by the Examiner on June 2, 1967. There were cross appeals from the Initial Decision by the counsel supporting the complaint and by the respondent (petitioner herein) to the Federal Trade Commission. On February 5, 1968, the Federal Trade Commission issued its order in which it partially sustained and partially reversed the Initial Decision by the Hearing Examiner. This is a petition to review that order of the Federal Trade Commission.

STATEMENT OF FACTS

Respondent (petitioner herein) has been associated with or affiliated with National Research Company and Floersheim Sales Company since approximately 1953. Floersheim Sales Company has been the exclusive sales agent for National Research Company since 1953. (R.T. 290, 15-24)

National Research Company was first organized in 1953 and was owned by Mitchell S. Mohr. Mr. Mohr does not have any connection with National Research Company at the present time and his interest was acquired in 1961 by Mr. Floersheim. (R.T. 291, 1-20)

Through these businesses, National Research Company

and Floersheim Sales Company, respondent is engaged in the business of preparing and selling printed forms and other material for use in obtaining information about alleged delinquent debtors and in the collection of delinquent accounts. Respondent causes the printed forms and other material, when sold, to be transported from his place of business, either in the State of California or in the District of Columbia, to purchasers who are located in various states in the United States. These printed forms and other material are sold to collection agencies, finance and loan companies, merchants who sell on installment accounts, and others who have unpaid accounts. Such purchasers use the forms and material for the purpose (A) of locating delinquent debtors whose present whereabouts is unknown or locating their places of employment, or (B) assisting in the collection of delinquent accounts by informing debtors to pay their unpaid obligations to their creditors by making payment directly to the creditors. (C.T. 91-92) (This represents the facts as they were found to exist by the Hearing Examiner.)

The forms sold by respondent which are used to obtain information as to debtors (commonly called "skip-tracer" forms) are forms which have been printed in IBM cards. There are several different types of these forms, depending on the kind of information sought. These skip-tracer forms are mailed to the debtors in brown window envelopes

and are accompanied by smaller business reply envelopes carrying a printed first class mail permit number, making a postage stamp on the return envelope unnecessary. The return envelopes carry one of the following printed names or designations as addressee: "Claimants Information Questionaire", "Current Employment Records", or "Change of Address". In addition to one of the preceeding designations, the return envelope also has respondent's mailing address: 748 Washington Blvd., Washington 5, D.C.

In addition, the skip-tracer forms include a list of instructions for filling out such forms, and in this list of instructions is printed the "Disclaimer" which is required by the Commission's order issued June 1, 1956. This "Disclaimer" makes it very clear that the purpose of the form is "to obtain information concerning a delinquent debtor and to further advise that this is not connected in any way with the United States Government." (C.T. 95 and 141-142)

The remaining forms subject to the Commission's order herein, are the "payment demand" forms which simply demand that the debtor pay his debt to the person designated on the form within a specified period of time. The "payment demand" forms are printed on standard IBM cards and are mailed to the debtors in brown window envelopes. (C.T. 102)

Washington, D.C., has been the main office of National

Research Company since its inception, a bank account was established there, licenses were obtained there and taxes paid there. (R.T. 297, 17-24)

The determination to open the office in Washington, D.C., was arrived at on the following basis: The laws of all states were checked with reference to collection licensing acts as Mr. Mohr was not sure whether they would be in the collection business; it was decided that Washington, D.C., was the best from the standpoint of law uniformity; a national organization was needed because most of the business would be done on the East Coast as the larger concerns had their home offices on the East Coast; and since there is a state jealousy, Washington, D.C., was the most logical spot. Respondent participated in the decision. (R.T. 296, 20 to R.T. 297, 16) There are several reasons why the office of National Research Company is still maintained in Washington, D.C., even though Mr. Mohr is no longer connected with it: fourteen (14) years of using the name "National Research Company" at the same address has created very valuable good will from a business standpoint; it is a national concern; two-thirds (2/3) of the business is done East of the Mississippi. (R.T. 300, 4-19)

The Washington, D.C., building address is the actual address of National Research Company and the names used by National Research Company. The same address has been used for fourteen (14) years with the exception of a room change

when larger quarters were needed. (R.T. 303, 16 to R.T. 304, 5)

The names of the skip-tracer forms used by the respondent were left with the postal authorities and the ones in use were acceptable to the Post Office. "Change of Address", "Current Employment Records", and "Claimant Information Questionaire" were all listed with the Post Office Department. This was done because a business reply envelope was used. (R.T. 305, 3 to R.T. 306, 6)

The brown envelopes, used to mail the forms to the debtors and to return the forms to respondent when the skip-tracer forms are mailed, are used because they are the cheapest envelope made. (R.T. 306, 16 to R.T. 307, 9)

Respondent uses meter mail or a regular postage stamp. It is a service rendered to the customers and they have their choice of using the meter service or the stamp. (R. T. 308, 3-19) The use of stamps was more or less exclusive at the beginning of the business and now the meter machine is used primarily. (R.T. 312, 14 to R.T. 313, 12) Respondent does not claim to have any interest in the actual collection of any debts shown on any of the forms, and no representation is made to anyone that it does have any interest in the debt. (R.T. 311, 24 to R.T. 312, 13)

ARGUMENT

I

THERE ARE NO "DECEPTIVE ACTS OR PRACTICES IN COMMERCE" IN THE SALE OR USE OF THE FORMS AND MATERIALS SOLD BY RESPONDENT AND THEREFORE SUCH SALES DO NOT VIOLATE SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT.

The language of Section 5 of the Federal Trade Commission Act (15 USCA 45) is simple and clear: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful." It is respondent's contentions that first, there is no deception at all either in the sale or use of the materials and forms produced by respondent is not in "commerce" and therefore is outside the jurisdiction of the Federal Trade Commission.

A. THE FACTS OF THIS CASE AS PRESENTED TO THE HEARING EXAMINER SHOW BEYOND A DOUBT THAT THE FORMS AND MATERIALS PRODUCED BY RESPONDENT DO NOT HAVE THE CAPACITY OR THE EFFECT OF DECEIVING EITHER THE PURCHASERS OR THE PERSONS TO WHOM THE FORMS ARE SENT BY THE PURCHASERS INTO A BELIEF THAT SUCH FORMS COME FROM THE FEDERAL GOVERNMENT.

The evidence introduced to the Hearing Examiner of the Federal Trade Commission, and relied upon by the Commission in its Order, consists of the following: The forms and materials themselves; the testimony of persons who received some of the forms from the respondent's purchasers; and certain "expert" testimony of several attorneys.

The forms and other materials which are the subject of the Federal Trade Commission Order in this case are made available to the court for examination as exhibits. Exhibits 5 through 25 are "Payment Demand" forms and envelopes and Exhibits 27 through 36 are "Skip-Tracer" forms and envelopes.

After carefully observing and examining the forms and materials and after hearing all the testimony, the Hearing Examiner concluded that in the cases of both the "Skip-Tracer" and "Payment Demand" forms and materials, it was simply the use of the brown window envelopes by creditors to enclose the forms which simulated an official or governmental origin and thus simulated that the forms were of the same origin. (C.T. 93-95 and C.T. 102; see also C.T. 117 where the Hearing Examiner states that: "... in the present proceeding the examiner finds that the primary unfair or deceptive practice of respondent relates to the envelope in which the form is received by the recipient.")

With reference to the use of brown window envelopes, it is important to note that many businesses use brown

window envelopes because brown envelopes are the least expensive, and window envelopes save much money in that the name and address of the addressee need only be typed once. It should also be noted, that any envelope used by Respondent carries either a postage stamp or is metered; government envelopes are free of any kind of postage and a statement to that effect is conspicuous on the face of a government envelope; and the color of the envelopes used by Respondent are a different color brown than those used by the government. In short, there is nothing on the envelope which would give anyone the impression that the material inside came from the federal government.

The Commission maintains that the use of Respondent's return address on the brown window envelopes along with the use of different colors on the forms inside gives the immediate impression that the envelope comes from the federal government. (C.T. 251) However, even assuming that a recipient of an envelope mailed by Respondent would think when first looking at it that it came from the government, that impression is immediately erased when the contents are noted after opening the envelope.

As can easily be seen, the "Skip-Tracer" forms have printed on them instructions to the addressee as to the proper method of filling out the forms. Included in these instructions is an unambiguous disclaimer which was required by the Commission's prior order under the previous

complaint, and the disclaimer sets forth the exact wording of that order: "The purpose of this card is to obtain information concerning a delinquent debtor and to further advise that this is not connected in any way with the United States Government." The Federal Trade Commission readily acknowledges that this disclaimer exists on every Skip-Tracer form produced by respondent, however, the Commission claims that the size of the print of the disclaimer is too small. (C.T. 252) In addition, the Commission maintains that the designations used for the Skip-Tracer forms are too "official sounding". (C.T. 96 and C.T. 251-252)

Respondent has done everything that could reasonably be expected of him to show that the forms known as "Payment Demand" state exactly what they purport to state, to wit: it tells the debtor to go to its creditor and pay the bill owing to the creditor. In addition, it merely states that the notice comes from "Payment Demand" in Washington, D.C. The Hearing Examiner acknowledged the fact that the form itself is clear as to its purpose in his finding No. 27 of the Initial Decision wherein he states in reference to the "Payment Demand" forms and materials: "The forms themselves do, to be sure, in large measure but not entirely, tend to dissipate the simulation." (C.T. 102) He also acknowledged this when he stated, "... respondent does not create unlawful simulation of governmental

documents or authority through his collection forms ('Payment Demand') as such. This is because they plainly reveal a private indebtedness and a simple demand for payment." (C.T. 123)

The fact that any governmental simulation created by the envelopes is erased by their contents is borne out by the Hearing Examiner's findings: as to the "Payment Demand" forms, the examiner states, "The forms themselves do, to be sure, in large measure, but not entirely, tend to dissipate the simulation." (C.T. 102) "-- However, these collection forms definitely do not produce the simulation in question by themselves, i.e., apart from their being used together with the brown window envelopes in which they are mailed." (C.T. 121) And as to the "Skip-Tracer" forms, the Examiner first states in reference to the designations used by respondent on such forms:

> "The Examiner's further conclusion is that the said names or designations are not fictitious, i.e. in any realistic sense for the purpose of proving misrepresentation. Respondent testified (TR 305-06), and the Examiner believes, that the Post Office cleared the use of the names or designations used on return envelopes. It would be difficult for the Examiner to conclude that the Post Office approved the use of 'fictitious names.' Actually the names are realistic and functional. Although

they are not registered tradenames (TR 69), and simply were adopted for the purposes of the business (id), this does not make them deceptive. Moreover, the charge of using 'fictitious' names goes far beyond the basic and repeated charge in the complaint as to the governmental or official origin.

"With the foregoing conclusions, it will be possible to consider, later in this decision, whether any order which issues in this case may properly permit the use of these names or descriptions, provided that there is a radical change in the brown window envelopes, by way of color or otherwise." (C.T. 96-97)

It is of interest to note at this point, that the order of the Hearing Examiner did not prohibit the use by Respondent of the designations.

In addition, the "Skip-Tracer" forms have printed thereon a statement disclosing that the purpose of the form is to obtain information concerning a delinquent debtor and not connected in any way with the United States Government. This statement is there for every recipient to read. However, the Examiner held that the disclaimer statement is "printed in such small type and is so inconspicuous that it is likely to be unnoticed by the recipient, particularly if uneducated." (C.T. 98)

All of these findings, including the finding that the disclaimer on the "Skip-Tracer" forms is too small and inconspicuous, should be considered in light of this Court's opinion in the case of IN RE SYDNEY FLOERSHEIM, No. 18313, decided April 18, 1963 (315 Fed.2d 423) which was the contempt hearing instituted by the Federal Trade Commission against Respondent for the claimed non-compliance with this Court's order regarding the "Skip-Tracer" forms. The only forms and materials now produced by Respondent which were not before this Court in the two prior cases is what is referred to as the "Payment Demand" forms. This Court expressed itself very clearly in that decision:

> "We cannot assume that which is expressed in plain English language on any form sent to any literate recipient in this Country would not be read, or not be understood. If that were true, no notice of any kind would be sufficient. It may be difficult to make the American public heed or read a printed statement of fact, but it is there so that all who look and read may know. It is in smaller print than some other words, but in the same size print as many others. In using this language, the respondent did exactly what the Federal Trade Commission in its order asked him to do. ..."

The Hearing Examiner considered this Court's opinion

in rendering his Initial Decision (C.T. 116-119 and 131); and although Respondent challenges the Examiner's interpretation of some of the opinion, it can at least be said that he considered this Court's opinion. The Federal Trade Commission, however, in its order completely dismisses that opinion as "clearly distinguishable." (C.T. 261) In spite of the fact that the issue before this Court in that case was whether or not Respondent was violating its prior order, the validity of what was stated there is not made erroneous.

If a person who receives one of the forms produced by Respondent can read -- that is, if he is "literate" -- then the disclaimer is on the "Skip-Tracer" form for him to read, and the "Payment Demand" forms merely refer him to his creditor. In either event, if the person is literate, the words are there to be read. The disclaimer is listed with the instructions on the form and it is in as large a print as anything on the form except the form designation and the word "NOTICE" over the instructions -- and in some instances Respondent's return address.

If, however, the forms are mailed to a person who is not literate -- that is one who can't read or if he can read a little he can't understand all of what he reads -- such a person will not be "deceived" into believing as the Commission claims. The reason -- he can't read so he will have to take the form to someone who can read or who can explain the form to him. Such a person will not go

to another illerate person, but he will go to one who can read and explain the form.

The validity of this assumption is well established by the witnesses called by the Commission to testify before the Hearing Examiner:

(1) Mrs. Mary Mossberg testified that she received a "change of address" form. (R.T. 100, 18-20) She thought the envelope had something to do with it coming from the income tax people. (R.T. 102, 8-9; R.T. 104, 11-13 and 16-20) However, she also testified that when she opened the envelope, she did not think it came from the income tax people. (R.T. 108, 25 to 109, 5)

(2) Mrs. Elida Gonzalez testified that she received one of the forms produced by Respondent and that she thought that it came from the government. (R.T. 221, 8-21) However, she further testified that she knew she did not owe the United States Government any money and that after she had opened the letter she knew that it was the same bill that Heritage Company (the creditor) had tried to collect from her. She stated that the card said to pay the bill to Heritage or some collection agency. (R.T. 225, 20 to 226, 2)

(3) Mrs. Miller -- Mr. Donald Haynes testified that Mrs. Miller received one of the forms produced by Respondent and that she brought it to him. (R.T. 143, 8-11) However, Mrs. Miller came to her own conclusion that the form had

come from a collection agency. (R.T. 158, 6-13)

(4) Mr. Manuel Gonzalez testified that he too had received one of the forms produced by Respondent, and that he thought the form came from the government. (R.T. 143, 8-11; 144, 1-6) However, it would appear from the record that Mr. Gonzalez is one of those who is not literate. (R.T. 193 to 204) His sole reason for thinking that the form was from the government seems to have been because it was mailed from Washington, D.C. (R.T. 195, 25 to 199, 5) However, because he could not read and did not understand what the form meant, Mr. Gonzalez went to see someone who could explain it to him. Mr. Donald Haynes, an attorney with the California Rural Legal Assistance, testified that Mr. Gonzalez brought the form to him and Mr. Haynes explained to him that it was not a claim from the government. (R.T. 148, 16-20)

(5) Mr. Richard Blackly testified that he was a school teacher and that he had received some of the forms produced by Respondent. (R.T. 232, 24-25; 233, 20-22) He stated that before he opened the envelope he thought it was a G.I. insurance dividend check -- it was the envelope's general appearance which made him think that it was from the United States Government. (R.T. 234, 11-13; 238, 15-23) After opening the envelope, however, he was completely satisfied that the letter was a request or a demand to pay a bill. (R.T. 237, 13-25) He knew that the letter was

from one of his creditors -- the United States Exchange Corporation. (R.T. 237, 13-25; 242, 23 to 243, 6)

Thus, it is evident that the forms produced and sold by Respondent have neither the capacity nor the effect of "deceiving" anyone that they come from the United States Government.

B. THERE IS NO "DECEPTION IN COMMERCE" BECAUSE, FIRST, "DECEPTION" REQUIRES INJURY AND THERE IS NO INJURY TO ANYONE IN THIS INSTANCE, AND, SECOND, EVEN ASSUMING THERE IS "DECEPTION" IN THE USE OF RESPONDENT'S FORMS SUCH USE IS NOT IN "COMMERCE."

"Deceit" is defined as, "A fraudulent and cheating misrepresentation, artifice, or device, used by one or more persons to deceive and trick another, who is ignorant of the true facts, to the prejudice and damage of the party imposed upon." Black's Law Dictionary, 3rd Ed., 493; see also PAIN v. KIEL, 288 Fed. 527, 529. Thus, it is clear that "deceit" requires damage or injury to someone. The Federal Trade Commission has never shown how anyone has been damaged or injured by the use of Respondent's forms. Every form sent out is either sent to a person who has an acknowledged debt (Mr. Gonzalez - R.T. 144, 1-6; Mrs. Miller - R.T. 158, 6-13; Mrs. Gonzalez - R.T. 223, 12-15; and Mr. Blackly - R.T. 237, 13-25) or it is sent to someone

else as a means of reaching one who has an acknowledged debt. Therefore, no one is "tricked" into any situation in which they are damaged.

In spite of this fact, and even assuming for the purpose of argument in this case that there is some form of true "deception" when people receive the forms in the mail from their creditors, it is Respondent's contention that the Federal Trade Commission has no jurisdiction to prevent such use of the forms.

The statute upon which jurisdiction is based by the Federal Trade Commission in this case states that, "... deceptive acts or practices in commerce, are declared unlawful." 15 USCA 45 (a) (1). Respondent concedes, of course, that the sale of his forms to his purchasers is "in commerce" as that term is used to designated interstate commerce. However, simply because the forms were sold in interstate commerce does not mean that there is "deception" in interstate commerce. Respondent has never deceived any of his purchasers as to his forms. In fact, there has never been any complaint to Respondent's knowledge by either a purchaser or the Federal Trade Commission that Respondent was deceiving any purchaser. The only claimed deceit is in the use of the forms and materials. The forms and materials are "used" only <u>after</u> they have been sold in interstate commerce. The "use", therefore, is not in interstate commerce and consequently there can be no "deceptive

acts or practices in commerce."

The Federal Trade Commission is an administrative agency and it has no powers except those granted to it by Congress. FEDERAL TRADE COMMISSION v. MENZIES, 145 F. Supp. 164, D.C. N.Y. 1956, affirmed 242 Fed.2d 81. Congress has given the Commission, through 15 USCA 41 and 45, the power to control "deceptive acts or practices in commerce." Thus, the only practices with which the Commission may concern itself are transactions in interstate commerce. BUNTE BROS. v. FEDERAL TRADE COMMISSION, 110 Fed.2d 412 (1940), affirmed 312 U.S. 349. Since all of the complained of acts or practices in this case occur well after the interstate commerce transaction, the Federal Trade Commission has no jurisdiction to control alleged deception occasioned by the use of the forms produced by Respondent.

II

THE ORDER ISSUED BY THE FEDERAL TRADE COMMISSION IN THIS CASE IS UNREASONABLE, ARBITRARY AND CAPRICIOUS AND IS THUS A DENIAL OF THE DUE PROCESS GUARANTEED RESPONDENT BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Supreme Court of the United States has long held that legislation by either state or federal legislators

must not be arbitrary or capricious -- it must be based on some rational basis. See UNITED STATES v. CAROLINE PRODUCTS CO., 304 U.S. 144 (1938). It cannot be that an administrative body such as the Federal Trade Commission is subject to any less of a standard when it exercises its powers of executive legislation.

The order issued by the Commission does not merely state that Respondent is to cease only those acts or practices which cause the so-called "deception." It goes much further and prevents Respondent from engaging in the business of helping to obtain information concerning delinquent debtors and assisting in the collection of delinquent accounts. The order prevents Respondent from using such simple, and as the Hearing Examiner found, functional, designations as "Claimant's Information Questionaire," "Current Employment Records," "Change of Address," and "Questionaire".. (See Hearing Examiner's finding at C.T. 96.)

The order also requires that Respondent include on any form he produces a statement "in a prominent place, in clear language and in type at least as large as the largest type, exclusive of captions, used on said form...." This order is made without any qualification as to the use of such a statement only on the forms in question, but the order states that such a statement must be included on any forms produced by Respondent in the business of "obtaining information concerning delinquent debtors or assisting in

the collection of delinquent accounts...." (C.T. 235)

In addition, the order prohibits the use of Respondent's Washington, D.C. return address on any envelope without also including on the envelope - "in a prominent place, in clear language, and in type at least as large as the largest type used on said envelope the identity of the creditor and the fact that the enclosed forms do not come from the United States Government...." (C.T. 236) Under such an order, Respondent cannot even use one of the names of any of his companies such as National Research Company or Payment Demand, Inc., without also including the name of the creditor. There is no basis for such an order.

This Court's language in the prior contempt proceeding becomes relevant at this point: "We cannot forbid an otherwise legitimate business from mailing its letters from the Country's Capital, whether the sender lives or has his business there, or elsewhere." 315 Fed.2d 423, 425. If this Court cannot so forbid, neither can the Federal Trade Commission.

The Hearing Examiner at least attempted to make an order which was based on some rational attempt to prevent what he thought were deceptive acts or practices. He made an attempt to "tailor" an order so as to allow Respondent to continue in his business and yet prevent those acts or practices which he thought to be "deceptive".

"So far as concerns the envelopes and forms

it is obvious from the Findings of Fact and the Conclusions of Law herein, and it is merely a restatement, that, assuming their correctness, respondent has engaged in unfair trade practices by simulating governmental or official documents, and authority, and that he has done so primarily by and through the distribution and use of the brown window envelopes in which the forms are mailed to debtors and others. Accordingly, it would seem that the order should certainly prohibit the use of these envelopes as distributed and used in the past.

"It also follows from the Findings and the Conclusions that respondent has, although perhaps in a somewhat lesser degree, simulated governmental and official documents, and authority, by the skip-tracer forms, principally by not making the present disclaimer thereon sufficiently large and prominent. Inasmuch as the examiner holds that a disclaimer is still necessary, the defect cannot be corrected simply by eliminating the envelopes as used in the past which would cure the simulation caused by the envelopes.

"Under the said Findings and Conclusions, however, respondent does not create unlawful simulation of governmental documents or authority

through his collection forms ('Payment Demand') as such. This is because they plainly reveal a private indebtedness and a simple demand for payment. Thus, the order to be issued need not proscribe the use of the collection forms. They may still be used by respondent if the unlawful simulation caused by the brown window envelopes is removed.

"Moreover, under the Findings and the Conclusions, the respondent does not create the unlawful simulation of governmental documents or authority by the distribution and use of the return envelopes themselves, as used with the skip-tracer forms. The simulation is not produced apart from the brown window envelopes in which the return envelopes are mailed with the skip-tracer forms. Accordingly, the order herein need not prohibit the distribution and use of the return envelopes if there is a sufficient prohibition of the brown window envelopes as used in the past.

"Nor, in the examiner's opinion, as will be discussed below, should the order herein attempt to prohibit the use of third party authority or of the address of a third party, or mailing the forms from Washington, D.C.

"To the examiner the foregoing makes it

absolutely appropriate that any order herein which it is tailored*/ to the lawfulness as actually found, must and should expressly prohibit (1) the use of these brown window envelopes and more specifically, the use of the color brown for these envelopes, (2) the use of the skip-tracer forms unless the disclaimer statement is made more adequate, and (3) nothing else in regard to forms and envelopes except by way of a general prohibition against simulating governmental or official documents, and authority.

"This would prohibit less in respect to the forms themselves than the prohibitions in the complaint counsel's proposed order. What this does contemplate is forbidding the respondent to continue to use brown window envelopes -- except, it may be added, by written authorization of the Commission as part of compliance procedure." (C.T. 123-124)

"*/ FEDERAL TRADE COMMISSION v. BROCH AND CO., 368 U.S. 360, 367, 368 (1962) - SWANEE PAPER CORP. v. FEDERAL TRADE COMMISSION, 291 F.2d 833, 838 (2d Cir. 1961) - MATTER OF TRANSOGRAM CO., INC., F.T.C. Docket No. 7978 (9/19/62); 61 F.T.C. 629, 700-702."

It is Respondent's belief that he was not accorded a

fair and unprejudiced hearing on this matter before the Federal Trade Commission itself, and that this is the reason for the vast difference in the order issued by the Hearing Examiner and that which was ultimately issued by the Commission. The attitude of the Hearing Examiner in his written opinion and that of the Commission in its written opinion validates such a belief:

Hearing Examiner's Opinion:

(1) "Respondent here has, to be sure, violated public policy and substantive law as to a very serious offense, the simulation of governmental or official documents, and authority. However, actually there are some extenuating circumstances in connection with this violation. In the examiner's opinion these circumstances are at least sufficiently extenuating so as, by themselves, to exonerate respondent from a cease and desist order as here proposed by complaint counsel, which would virtually put him out of business." (C.T. 130)

(2) "The examiner believes that respondent testified truthfully about this. Moreover, his testimony narrated a number of details inherently tending to demonstrate its reliability as to the salient fact testified to." (C.T. 130)

(3) "The examiner equally believes that respondent will conform to the law if the mandates are made

clear to him, as they are in the order below. As a witness, the respondent impressed the examiner both by his testimony and demeanor as being an honorable and dependable person who was merely fighting for what he thought was right as a businessman." (C.T. 133)

The attitude of the Commission on the other hand is displayed in the first sentence of their opinion: "This appeal is the latest round in what has become a Brobdingnagian battle between the Commission and this Respondent."

The Commission made an unreasonable, arbitrary and capricious order against Respondent without any rational basis for such a wide sweeping and devastating blow to Respondent's business -- except perhaps its own prejudices against Respondent. Such an order should be reversed by this Court.

III

THE FEDERAL TRADE COMMISSION EXCEEDED ITS JURISDICTION IN MAKING AN ORDER IN THIS CASE WHICH GOES FAR BEYOND THAT WHICH IS NECESSARY TO PREVENT "DECEPTION IN COMMERCE".

As was pointed out above, the Federal Trade Commission is given the power in the Federal Trade Commission Act to prevent "deceptive acts or practices in commerce." 15 USCA 41 and 45. However, the Act does not give the

Commission power to issue orders which go far beyond that which is necessary in order to prevent the claimed "deception". As also noted previously, the Hearing Examiner found that as to the "Skip-Tracer" forms, the only deception was caused by the brown window envelopes and that the disclaimer on the "Skip-Tracer" forms was too small to prevent the deception, (C.T. 123) and as to the "Payment Demand" forms the only deception was caused by the use of brown window envelopes: " -- However, these collection forms definitely do not produce the simulation in question by themselves, i.e., apart from their being used together with the brown window envelopes in which they are mailed." (C.T. 121)

The Commission's Order goes far beyond preventing such deception. The effect of the Commission's Order is to order Respondent out of business. The Hearing Examiner recognized this result in his opinion:

> "The question of scope of order is inextricably intertwined with questions of public policy. Although complaint counsel's proposed order herein, designed to curb respondent's unlawful conduct, would tear asunder a specialized business technique, if not the business itself, and virtually destroy a rather ingenious system of forms designed to assist in the collection of debts, it is doubtful that public policy or

public interest requires such a drastic result. To bring about such a result by the order, instead of concentrating the prohibition of the order on the simulation, largely by the envelopes, of governmental or official authority, is, in the examiner's opinion, quite analogous to taking away an established trade name containing an element of simulation, instead of permitting the trade name to be used in some qualified or limited way which removes the simulation.*/

"To begin with, there is, of course, nothing inherently wrong about the collection business, or about the skip-tracer and collection form business. So long as we continue to have in this country a competitive free enterprise system such as we now have, there will have to be legal means to compel or attempt to induce debtors to pay their debts. Moreover, it is obvious under our system that if debtors do not pay their debts the loss to creditors is shifted to other consumers or purchasers; or if the loss becomes so large

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"*/ See: FEDERAL TRADE COMMISSION v. ROYAL MILLING CO., 288 U.S. 212, 217 (1933) - JACOB SIEGAL CO. v. FEDERAL TRADE COMMISSION, 327 U.S. 608, 612, 613 (1946).

as to be insurmountable, the result is bankruptcy for the creditors or at least going out of business. The respondent, citing respectable credentials for himself as to expertise, has testified to this, if actual testimony is necessary to prove the point. Our society is not as yet so permissive that people are not supposed to pay their debts or submit to reasonable efforts to collect the debts.

"Skip-tracer and collection forms are necessary, it seems to the examiner, because of the small dollar amount of each indebtedness in many lines of trade, particularly as brought about by mass selling, which is so characteristic of our present free enterprise system. Obviously, lawyers cannot afford to take on accounts of this nature, or, if they do -- often as auxiliaries to collection agencies -- the amount of their fees and court costs tend to discourage further retention of the attorneys or of the collection agencies which may have retained them. Moreover, the fees of collection agencies even without forwarding to attorneys are not unsubstantial. Small businesses, which many people regard as of particular concern to the Commission, as well as middle-sized businesses,

thus very often have to depend on collection efforts through collection forms, rather than utilizing collection agencies, with or without attorneys, or utilizing attorneys directly.

* * *

"It is true that sometimes alleged debtors may not be actual debtors. But as against this there are the 'deadbeats', comprising large numbers of people who do not even wish to pay their debts, who may purchase and deliberately change addresses over night, and who may thus merely load their indebtedness on other purchasers or bankrupt the sellers, much as respondent herein testified." (C.T. 127-129)

Respondent's valid business enterprise should not be completely destroyed by an order of the Commission which is so encompassing and over-broad that it constitutes an exercise of jurisdiction which the Commission has not been given. That part of the Order which goes beyond what is required to prevent "deception" is void and this Court should reverse the ruling by the Commission.

IV

THE ISSUE OF THIRD PARTY AUTHORITY WAS NOT RAISED BY THE COMPLAINT IN THAT THERE WAS NO MENTION THAT RESPONDENT HAD COMMIT-

TED ANY ACTS FROM WHICH AN INFERENCE COULD BE DRAWN THAT DEBTS HAD BEEN REFERRED TO ANYONE FOR COLLECTION.

The Hearing Examiner at the pre-hearing conference in Washington, D.C., granted permission to counsel supporting the complaint to move to amend the complaint to plead the "third party mailing issue" as part of the conclusory portion of paragraph 10. (R.T. 35, 4-16) Counsel supporting the complaint did not move to amend the complaint.

According to the brief below of counsel supporting the complaint, "By a third party referral is meant conveying the inference by the creditor that a debt has been referred to someone for collection when that is not true." (C.T. 220) However, the complaint did not allege that any such actions had been committed by Respondent. Paragraph 10 of the complaint merely states that the forms and other material has had and now has the tendency and capacity to mislead and deceive persons to whom said forms are sent. There is no pleading to indicate that any alleged deception occurs merely because the notice comes from "Payment Demand" in Washington, D.C. (C.T. 6)

The Hearing Examiner ruled that such a third party authority issue had not been sufficiently raised by the complaint, but the Commission reversed on the grounds that the complaint "comprehends a charge that respondent's

forms represent that a third party, unrelated to the creditor, has an interest in the debt or in seeing that the debt is collected." However, the purpose of a complaint is not that it "comprehend" an issue or a charge but that it give notice to the defendant or respondent of the charges being made or the issues being raised. The respondent should not be made to guess which issues or charges are being made or are being pressed.

The ruling of the Commission as to the third party authority issue is erroneous and this Court should reverse the Commission and adopt the ruling of the Hearing Examiner:

> "As to the existence in the complaint of any charge of misrepresentation as to third party authority or use of a third party address, complaint counsel stated at the prehearing conference that he relied on the facts as alleged in FOUR and FIVE of the complaint, and the general allegation of deception in TEN, as referred to above. However, he finally stated at the conference that he would move to amend the complaint to include such a charge (TR 35, l. 1-3). The examiner stated that he would give him leave to make such a motion (TR 35, l. 4), intending to certify the motion to the Commission as being within its sole prerogative under its Rules and

the STANDARD CAMERA case.* The examiner also stated: 'If you don't make such a motion, I think I can rule now -- and I will rule -- the issue is not in the case ....' (TR 36, l. 12)

"It so happens, however, that complaint counsel, for reasons not known to the examiner, ultimately elected not to make the motion, and has never made it. Under these circumstances the examiner now concludes, after much deliberation, that he cannot hold that a charge of misrepresentation as to third party authority or the use of a third party address is alleged in the complaint. A contrary holding would, at the very least, be unfair to respondent, who has been lulled into a sense of security and deprived of possible proof, expert or otherwise, in his behalf. Even if the complaint could possibly be construed to allege such a charge, complaint counsel should be estopped from so contending." (C.T. 86-87)

V

THE COMMISSION IS BOUND BY ITS OWN RULES OF PRACTICE AND THOSE RULES REQUIRE THAT THE COMMISSION REOPEN PROCEEDINGS TO

QUESTION CONDUCT WHICH WAS THE SUBJECT OF THOSE PRIOR PROCEEDINGS.

As has been previously noted, the complaint first issued against Respondent by the Commission in 1954 covered the same "acts of deception" covered by the complaint issued in this case with the exception of the "Payment Demand" forms.

It is clear that respondent filed compliance reports under the previous order on June 27, 1960, and August 28, 1963 (Exhibits 1A-L; 3A-QQ). Those reports were accepted by the Federal Trade Commission on June 30, 1960, and December 20, 1963 (Exhibits 2; 4). It is also clear that no action has been taken to either revoke the prior approval or to reopen the previous proceedings.

Section 3.26(c) of Rules of Practice for Adjudicated Proceedings of the Federal Trade Commission provides that:

> "The Commission may at any time reconsider its approval of any report of compliance or any advice given under this section and, where the public interest requires, rescind or revoke its prior approval or advice. In such event the respondent will be given notice of the Commission's intent to revoke or rescind and will be given an opportunity to submit its views to the Commission."

Section 3.28(b) of the same rules provides that:

"Whenever the Commission is of the opinion that changed conditions of fact or law or the public interest may require that a Commission decision containing an order to cease and desist which has become final by reason of court affirmance or expiration of the statutory period for court review ... the Commission will serve upon each person subject to such decision and order an order to show cause, stating the changes it proposes to make in the decision and the reasons they are deemed necessary."

The statute upon which these rules are based is 15 USCA 45(b) wherein it is stated:

"After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or law have so changed as to require such action or if the public interest shall so require ..."

The Commission did not follow its own Rules of Practice in any respect. A completely new complaint was

issued instead by the Commission.

In its Order, the Commission in discussing this very point cites the case of ELMO DIVISION OF DRIVE-X CO. v. DIXON, 348 Fed.2d 342 (D.C. Cir. 1965). The Commission maintains that that case is "clearly distinguishable" from the present one because of its unique set of facts. However, the Commission fails to note some important language of that decision which does not depend on the fact that the particular Rule of Practice there involved was incorporated in the consent agreement. Footnote "4" of that opinion reads as follows:

> "The Commission argues that since the statute says the Commission 'may' reopen, no such mandatory language appears as supported District Court jurisdiction in KYNE. While not reaching the question of the sufficiency of the statutory language alone to support jurisdiction, we note in passing that the Commission's argument is not weighty. A provision that the Commission 'shall' reopen would make no sense at all: Reopening is meant to be discretionary with the Commission, and reopenings the exception rather than the rule. We think it more likely that the language means the Commission <u>may</u> reopen any order if it chooses, and if it does so, it <u>shall</u> proceed

in the manner detailed in the statute."

(Emphasis in original) at p. 344

The statute the court was there discussing is the same statute here involved: 15 USCA 45(b).

Thus, the Commission has not followed its own Rules of Practice in this case and should be estopped from proceeding in the matter under the new complaint.

CONCLUSION

It is respectfully submitted that irrespective of any other decisions of the Federal Trade Commission, this case must stand on the facts involved herein. Previous orders of the Commission resulting in cease and desist orders were based on facts which are distinctive from the instant case.

The Order of the Federal Trade Commission is erroneous as well as void. This Court should vacate that Order and dismiss the complaint.

Respectfully submitted,

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